1978

State of Utah v. Peter Leonard Lyon : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

PETER LEONARD LYON,

Defendant-Appellant.

Case No. 15606

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY, UTAH, HONORABLE JOHN F. WAHLQUIST, JUDGE

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is a criminal action for failure to stop a vehicle at the command of a police officer, commonly known as "evading a police officer," in violation of Utah Code Ann. § 41-6-169.10 (1953 as amended).

DISPOSITION IN THE LOWER COURT

The case was tried to a jury and appellant was found guilty as charged and sentenced to a term of 360 days, in the Weber County Jail, with 348 days of the term suspended provided appellant:

1) pay a fine of $100.00;

2) pay jury costs;

3) not associate with certain individuals as

directed by the Adult Probation and Parole section;

4) surrender his license; and

5) enter into regular probationary terms.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the conviction.

STATEMENT OF FACTS

On July 27, 1977, at 4:00 a.m., Weber State College Security Officer Terry Carpenter was enroute from the main campus to the construction site of the Dee Special Event Center which he patrolled several times a night to check for vandals (T.3,12). The center is approximately four blocks south of the main campus (T.5). As Officer Carpenter approached the intersection of Taylor Avenue and Country Hills Drive, which lies adjacent to the Dee Center parking lot (Exhibit D), he observed a man, identified as appellant (T.23), lay down a motorcycle in the intersection (T.10). As soon as Officer Carpenter turned the corner, appellant mounted his motorcycle and accelerated away from the security officer's car, which was white with a star on the door, a light bar on top and a colored spotlight on each side (T.4,34). Concerned that appellant may have stolen items from the center, Officer Carpenter turned on his emergency lights after he determined that appellant was not going to stop his vehicle and enable the officer to conduct a general field investigation (T.14).

Appellant twice turned his head to look at Officer Carpenter but did not stop; so the officer turned on his siren (T.15). With the officer in pursuit, appellant ran three stop signs (T.17,20). As he attempted to enter a driveway from Tyler Avenue, he lost control of the motorcycle and tipped over (T.21). Officer Carpenter exited his vehicle and arrested appellant (T.21).

In his defense, appellant testified that he had had to kick-start the motorcycle at the County Hills-Taylor Avenue intersection (T.86). He observed a police car following him but believing he had done nothing wrong, he accelerated, afraid that the officer was going to beat him up, as appellant claimed he had been threatened by police officers for several months (T.87). He testified that he was attempting to get to the home of Ogden Police Detective Bob Searle, a friend who lived three houses from the arrest site (T.88). Appellant admitted that he had no Utah motorcycle license, that he ran stop signs, and exceeded the speed limit during the pursuit, and that he intentionally did not stop his vehicle for Officer Carpenter (T.88,96,97).

ARGUMENT

POINT I

THE SECURITY OFFICER WAS ACTING WITHIN THE SCOPE OF HIS STATUTORY AUTHORITY WHEN HE ATTEMPTED TO STOP APPELLANT.

At the conclusion of the State's case, appellant moved to dismiss on the grounds that the prosecution had failed to prove that the college security officer was acting within the scope of his authority when he first attempted to stop appellant (T.51). The trial court denied the motion and submitted the issue to the jury (T.55).

Appellant suggests that denial of his motion was error, claiming that Officer Carpenter was acting without legal authority. The statute governing the issue, Utah Code Ann. § 53-45-5 (1953 as amended), supports the trial court's decision providing in pertinent part:

> "Members of the police or security department of any state institution of higher education. . .shall be peace officers and shall also have all of the powers possessed by policemen in cities . . .providing, however, that such powers may be exercised only in cities and counties in which such institution, its branches or properties are located and only in connection with acts occurring on the property of such institution or when required for protection of its interests, property, students, or employees. . ." (Emphasis added)

The fundamental issue then is whether Officer Carpenter's actions were required to protect the interests and the property of Weber State College, specifically the Dee Special Events Center. In his testimony, Officer Carpenter described the factors which let to his decision to investigate appellant:

"I observed the motorcycle. As I approached the intersection, it caught my eye immediately because there was no movement at all. . .He appeared to me to lay the motorcycle down, and out of my own wondering, with the amount of destruction we've had at the Dee Center, I wondered had he been involved with something at the Dee Center. Were his arms full of things that he was trying to ditch or something like that? Was something wrong with his bike? Had it quit? I had no idea. It was 4:00 o'clock in the morning. I assumed that he was either having problems or he was hiding from me. . ." (T.10)

"Initially when I made the turn, my intentions were to inquire of him who he was, what he was doing at this time of morning. . ." (T.11-12)

"If in fact he had been on the Dee Center, it would have been very easy to find motorcycle prints, so my intentions then were to get close enough to see him, to see if he may have had anything in his hands, if he could have been stealing anything from the Dee Center. That was the main thing. . ." (T.12)

"How was I acting? Definitely on behalf of the college. They're the ones that put me to check the Dee Center. That's what my whole purpose for being there was to check the Dee Center on behalf of the college." (T.14)

From this testimony it is clear that Officer Carpenter was acting in furtherance of his statutory mandate to protect the interests and property of the college. Cognigant of past

vandalism at the nearby Dee Center, he sought to investigate appellant, who was acting suspiciously, and determine if he had stolen items from the center, the protection of which was a duty of his employment.

The instant case is distinguishable from State in the Interest of Hurley, 28 Utah 2d 248, 501 P.2d 111 (1972), in which a college security officer interrogated two juveniles who appeared to be tampering with a vehicle parked in an alley a half block from the University of Utah campus. The youth scuffled with the officer, Hurley was arrested, and convicted of interfering with an officer. The Utah Supreme Court reversed, finding University interests "too remote and indirect to invoke the extraterritorial exception." Protecting the cars of unknown persons in an off-campus alley is not analagous to the instant case, where the security officer intervened because he had reasonable cause to believe that the property of the college may have been vandalized and/or stolen by appellant. Protecting real or personal property of a college includes surveillance, pursuit and arrest of wrong-doers, and recovery of stolen items. Therefore, if Officer Carpenter actually investigated and pursued for the sole purpose of protecting the property and interests of the college, as he so testified, he was acting with legal authority in conformity with Utah Code Ann. § 53-45-5 (1953 as amended).

The Oklahoma case, Courange v. State, 510 P.2d 961 (Okla Crim. App. 1973) is not helpful to appellant. In that case the college security officer arrested a person for "driving under the influence" when the controlling statute only authorized the security officers to protect and guard the grounds, building, and equipment of the institution. Since an arrest on a public road for drunk driving was clearly outside the grant of authority, the conviction was reversed.

Hurley concludes that exigent circumstances justify the extra-territorial exercise of power by a college security officer, and in the case at bar compelling circumstances were present which required Officer Carpenter to act. If appellant had stolen items from the Dee Center and was transporting them to another location, recovery of the items and arrest of the perpetrator were remote without intervention and pursuit by the officer. No other police cars were at the scene. In fact, during the pursuit, Officer Carptener radioed the Highway Partol for assistance (T.16), but no further mention is made, indicating that no highway patrolman joined the pursuit and converged on the arrest location. Therefore, given his reasonable suspicion, Officer Carpenter was obligated to investigate the appellant, in order that the security of the college buildings and grounds not be jeopardized. Respondent submits that because the officer reasonably believed that the direct,

immediate interests of the institution concerning its property were involved, the exigent circumstance standard of Hurley has been met and that the jury could properly find that Officer Carpenter was acting within the scope of his legal authority.

POINT II

THE LOWER COURT GAVE AN APPROPRIATE INSTRUCTION CONCERNING THE STANDARD FOR INTERVENTION OF SECURITY OFFICERS IN OFF-CAMPUS MATTERS.

Jury Instruction No. 6 provided in part:

> "You are instructed that a peace officer of a college in Utah has authority to act on the college property. He also may act in the area surrounding the institution, but only when it would reasonably appear to a prudent person that such act was in fact reasonable for the protection of the interests, property, students, or employees of the institution."

Appellant complains that the articulated reasonableness standard is error as State v. Hurley, supra, enunciated exigency doctrine and Utah Code Ann. § 53-45-5 (1953 as amended) states that the off-campus actions must be required for the protection of the college's interests, property, students, or employees. Respondent submits that actions which are reasonable in achieving the statute's protection objectives are in fact required. If it is reasonable for a college security officer to apprehend a youth who has stolen a university car and is

fleeing off-campus, it is required of the officer to do so. Private citizens may have the option in similar circumstances to act or not; however, in the performance of their professional duties, peace officers must do what is reasonable to do, especially in matters of protection. If it is reasonable for a security officer to take away a gun from a campus trouble-maker, surely it is mandatory that he do so.

Therefore, a finding by the jury that Officer Carpenter acted reasonably in protecting campus property was also a finding that his actions of pursuit and arrest were required. While different language in the instruction might have been more precise, under the facts of this case, reasonableness is synonymous with necessity. If the wording was error, it was harmless, the two standards having merged in Officer Carpenter's professional obligation and duties.

POINT III

THE TRIAL COURT'S INSTRUCTION REGARDING HOT PURSUIT WAS AN ACCURATE STATEMENT OF THE LAW.

As part of Instruction No. 6, the lower court instructed the jury as follows:

> "If a peace officer acts outside his jurisdiction, he acts as an ordinary citizen and he has no powers beyond those of an ordinary citizen and a person who evades him would not be evading a peace officer. However, if the person flees into or through the peace officer's jurisdiction, it might take on the character of a peace officer's activities and so

continue as long as the peace officer is in 'hot pursuit', that is directly attempting to capture or catch."

Respondent contends that this instruction is supported by Utah Code Ann. § 77-13-36(1)(a) (1953 as amended) which defines "fresh (hot) pursuit":

> "The term, 'fresh pursuit', as used in this act shall include fresh pursuit as defined by the common law and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay." (Emphasis added)

Appellant suggests that the instruction was erroneo "since the offense involved in the present case was at most a misdemeanor." Respondent, however, contends that appellant's statement is error, the Utah Code Ann. § 76-6-412 (Supp 1977) defining several classes of theft, which include felony of the second degree and felony of the third degree, in addition to two misdemeanor classes. Since Officer Carpenter was unable to determine what was perhaps being stolen - or its value - he could not assume that if a theft had occurred at the construction site the value of the stolen item was less than $250.00, the maximum value allowed for a misdeameanor class theft.

Therefore, given the officer's reasonable suspicions that a felony might have occurred, he was within the protection ambit of the fresh pursuit statute, even if this court should determine that he was without original jurisdiction. Once appellant traveled the roadway which abutted college property on both sides (T.46), Officer Carpenter was authorized to pursue.

POINT IV

THE TRIAL COURT'S INSTRUCTION CONCERNING THE POWER OF AN ORDINARY CITIZEN TO ARREST FOR A MISDEMEANOR WAS HARMLESS ERROR.

Ordinarily it is error to instruct on abstract principles of law that are not applicable to the facts before the jury. Since no evidence was offered at trial which would support a finding that Officer Carpenter was acting as a private citizen, and the state's theory of the case was that the officer was acting within the scope of his legal authority as a college security officer, it may have been error for the trial court to instruct the jury that: "A private citizen may arrest for a misdemeanor immediately observed by the citizen."

However, respondent submits that such error was harmless under the facts of this case, where the state's evidence was offered to prove that Officer Carpenter was acting as a peace officer authorized by Utah Code Ann. § 53-45-5 (1953 as

amended). In State v. Anselmo, 558 P.2d 1325 (Utah 1977) this court affirmed a conviction for aggravated sexual assault where the trial court gave an erroneous instruction regarding rape of an unconscious victim, and the state's evidence indicated that the victim was alert. Although finding the giving of the instruction error the court held that "since there was absolutely no way the jury could have related the instruction to the verdict, it was harmless error." 558 P.2d at 1327, footnote omitted.

According respondent urges the court to hold harmless that portion of Instruction No. 6 that may have been error as the evidence that Officer Carpenter was acting as a peace officer is substantial, credible and supports the verdict, and there is no showing that but for this erroneous instruction, appellant would have been acquitted.

CONCLUSION

Because the college security officer acted within his legal authority in pursuing and arresting appellant and any subsequent instructional error at trial were harmless, respondent urges the court to enter an order affirming the verdict.

Respectfully submitted,

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